

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Board finds the Order denying benefits should be affirmed but does so for reasons different than those given by the ALJ.

FINDINGS OF FACT

1. Claimant suffered injury arising out of and in the course of his employment with respondent on August 19, 1994. The injury occurred as claimant moved a tub of re-grind with a pallet jack. He slipped and fell to the ground, experiencing sharp pain from his lower back up to his neck.
2. On February 5, 1995, claimant executed a Form D settlement and release of liability. Claimant testified the description of the accident and the date of accident were not on the form at the time. The Form D was later filed with the Division of Workers Compensation showing a date of accident of October 14, 1994, and describing the injury as a chronic thoracic sprain. The settlement is based on 2 percent impairment to the whole person.
3. Claimant testified that respondent referred claimant to Dr. Pedro A. Murati for the injury of August 19, 1994. The medical records show Dr. Murati's diagnosed chronic thoracic strain for injury on August 19, 1994, and rated the impairment as 2 percent of the whole body. As of January 26, 1995, he concluded claimant had reached maximum medical improvement.
4. Claimant also testified that at the time he signed the Form D, he was told his condition would be re-evaluated in a year. He did not expect the execution of the form to terminate his benefits and he did continue to receive treatment from the company nurse through March or April 1996 when he was terminated. In connection with the Form D, claimant received \$2,120.48 for settlement of a claim.
5. After leaving employment for respondent, claimant went on his own to see Dr. Eustaquio O. Abay II. Dr. Abay performed surgery on claimant's back at the L5-S1 level in February of 1999.

CONCLUSIONS OF LAW

1. The Form D did not settle a claim for accidental injury on August 19, 1994. When filed with the Division by respondent, the form stated an October 1994 date of accident. Even if parol evidence is considered to determine the intention of the parties, the Board cannot, on the basis of the record presented, determine that the parties intended that the Form D apply to the August 19, 1994, accident. Respondent argues that it applies to the August accident but offers no evidence, other than the document itself, of the respondent's intention. The argument by counsel is not evidence of what respondent intended. Claimant, on the other hand, testified he did not understand that the Form D would end his claim.

2. Claimant did not file a timely written claim for accidental injury on August 19, 1994. Claimant testified he did not complete any paperwork at the time of the accident. Claimant had 200 days from the accident or last payment of compensation to make a written claim. K.S.A. 44-520. Claimant did not miss work for the accident and accordingly the employer was not obligated to file a report of accident. Therefore, the time would not be extended to one year by failure to file a report of accident. K.S.A. 44-557. The only written claim came in March 1999 when the Application for Hearing was served. The last authorized medical treatment would have been in March or April 1996. The written claim would be out of time even if claimant did have one year to make the claim.

At the close of the hearing, claimant's counsel argued the Form D settlement document would be a claim. But the Board does not believe claimant can on the one hand argue the Form D does not relate to the August 19, 1994, accident, and at the same time contend the Form D is written claim for the August 19, 1994, accident. If the Form D relates to August 19, 1994, it settles the claim. If it does not, it is not a written claim for an accident on that date.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order entered by Administrative Law Judge John D. Clark on April 20, 1999, should be, and the same is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of July 1999.

BOARD MEMBER

c: Joseph Seiwert, Wichita, KS
Edward D. Heath, Jr., Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director